

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

WEDNESDAY, THE 26TH SEPTEMBER 2007 / 4TH ASWINA 1929

Crl.Rev.Pet.No. 2786 of 2003()

CRL.A.NO.254/2002 OF THE SESSIONS COURT, THRISSUR
C.C.NO.224/1996 OF THE JFCM, CHALAKKUDY.

REVN. PETITIONER: APPELLANT/ACCUSED

GILBERT MANI N., AGED 52 YEARS,
CIRCLE INSPECTOR OF POLICE, MALA.

BY ADV. SRI.M.K.DAMODARAN

RESPONDENTS: RESPONDENTS/COMPLAINANT

1. THE STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.
2. BALAKRISHNAN S/O. ANANDAN, PONNACHERY
HOUSE, ASHTAMICHIRA DESOM, MUKUNDAPURAM TALUK.

BY ADV. SRI.K.S.MADHUSOODANAN
PUBLIC PROSECUTOR, SRI THOMAS JOHN AMBOOKEN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 30/05/2007, THE COURT ON 26/09/2007 PASSED THE
FOLLOWING:

K.R.UDAYABHANU, J.

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Crl.R.P.No.2786 of 2003-D
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Dated this the 26th day of September, 2007

O R D E R

The revision petitioner is the accused in C.C.No.224/1996, who has been charge sheeted for the offences under Sections 323 & 330 I.P.C and sentenced to undergo simple imprisonment for one month and to pay a fine of Rs.1000/- for the offence under Section 323 I.P.C and to undergo simple imprisonment for one year and to pay a fine of Rs.4000/- for the offence under Section 330 I.P.C. and that in default of payment of the fine amount to undergo simple imprisonment for six months.

2. The matter arose out of a private complaint filed alleging that the complainant was falsely implicated in Crime No.236/1996 of Mala Police Station which was registered under Section 376 I.P.C. The allegation in the above crime is that the petitioner raped a woman by name Leelamani aged 73 years. According to the petitioner while he was sitting in the S.N.D.P union office at Ashtamichira he was taken to the police station in the police jeep on 21/09/1996 in the morning. At the police station he was asked to confess that he committed rape of the above lady. As he denied the same he was put in the lockup.

On the next day in the morning at about 8 a.m the accused/revision petitioner who was the Circle Inspector of Police pressed him to the wall of the lockup and forced him to remove his undergarment and inserted three match sticks into the phallus of the complainant, one after another. On the same day he was produced before the Judicial Magistrate of the First Class, Kodungallur, and was remanded to Sub Jail, Irinjalakuda. On reaching the Sub Jail, he wanted to urinate. He felt excruciating pain and difficulty to pass urine. From the Sub Jail he was taken to Government Hospital, Irinjalakuda, and therein, the doctor removed the match sticks from the phallus. The allegation is that the accused caused hurt to him in order to extort confession and committed offence under Sections 324 and 330 of the I.P.C.

3. The evidence adduced in the matter consisted of the testimony of PWs.1 to 4 and Exts.P1 to P8(a). Both the courts below concurrently found that the accused is guilty of the offences under Sections 323 and 330 I.P.C.

4. The contention raised herein is that the trial of the accused is hit by Section 197 Cr.P.C., as according to the revision petitioner, the accusation even if found true is alleged to have been committed by

him while acting or purporting to act in the discharge of his official duty and that no court can take cognizance of it except with the previous sanction of the Government. It was also contended that the allegation is absolutely false and that it is likely that the accused himself would have put the match sticks inside the phallus while he was in the Sub Jail.

5. Crime No.236/1996 is with respect to the complaint of a 73 year old lady that she was raped in her bathroom in the day time by an identifiable person aged about 35 years, that is, on 18/09/1996. The complainant is a person who had purchased three cents of land from the de facto complainant in Crime No.236/1996 and who is closely known to the lady. After taking into custody of the complainant herein on 21/09/1996, he was subjected to potency test at Government Hospital, Mala, at 5 p.m. Subsequently, after he was released from the Sub Jail on 11/10/1996 he along with the alleged victim moved the High Court seeking removal of the investigating officer vide C.M.P.No.153/1998. As per the order of the High Court, the investigation was ordered to be conducted by D.Y.S.P Crime Branch. Subsequently, as per Ext.P3 report the complainant herein was deleted from the array of the accused and one Shaju was arrested

on 17/10/1996 as can be seen from Ext.P5 remand report. Subsequently, the above Shaju who stood at trial was acquitted. On release from custody, the present petitioner instituted the proceedings herein on 17/12/1998.

6. In support of the case of the complainant that he was tortured in custody, he himself was examined as PW.1. PW.2 is the Superintendent of Government Hospital, Irinjalakuda, who has produced the original wound certificate in the matter which has been marked as Ext.P6. It was brought out in the cross-examination of PW.2 that the match sticks can be inserted in the phallus and upto five hours the same need not produce any inflammation. PW.3 is the Superintendent of Sub Jail who has produced Ext.P7 register where from it can be seen that on 22/09/1996, the complainant herein was sent to Government Hospital, Irinjalakuda, from the Sub Jail. He has also stated in the cross-examination that when persons are brought to the jail, they will be thoroughly searched before taking into the cell. He has also stated that it is after 12'o'clock that the complainant herein was admitted at the Sub Jail and he came to know that immediately he was taken to the Government Hospital, which is situated about 100 metres away from the sub jail. PW.4 is the doctor

who removed the match sticks from the phallus of the complainant and he has issued Ext.P8 report of the examination of the petitioner wherein it is mentioned that three match sticks were removed from his phallus and he forwarded the report along with the match sticks to the court through the Superintendent of Sub Jail. It was brought out from his examination that the match sticks, if dipped in oil can be inserted in the phallus without causing any injuries and that the petitioner had sustained no injuries. There was no external or internal injuries to the phallus. It was brought out that he was produced before the Magistrate at his residence in the morning. At about 10 a.m he was taken from the police station to the residence of the Magistrate. PW.4 the doctor has testified that the match sticks are made of soft wood and had chemical on its one end. The match sticks that was forwarded by PW.4 to the Superintendent of Sub Jail could not be produced. It was also suggested to PW.4 that the persons having perversions may insert the match sticks to the phallus. It was also brought out that PW.1 is a person engaged in treating persons and administering Ayurvedic medicines for having sexual problems. The evidence of PWs.1 to 4 was found to be convincing. The non disclosure of illtreatment when he was produced before the Magistrate was highlighted by the defence. But the same was

rejected by the courts below taking into consideration the psychological status of the complainant at the time as he would have been under threat of the police and as he had no previous criminal record. But in the records relating to treatment etc., that is, Exts.P6, P7 and P8, he has mentioned the alleged cause that the match sticks have been inserted by the police. I find that on a consideration of the evidence adduced in the matter as well as in view of the concurrent findings of the courts below, the allegation that he was subjected to torture to extort confession stands proved.

7. The contention of the revision petitioner that even if custodial torture is established if the allegation is that the same was inflicted while the accused was acting or purporting to act in the discharge of his official duty taking cognizance of such offence is hit by Section 197 Cr.P.C and previous sanction is the pre-requisite. No doubt what has been done by the accused/revision petitioner is an offence and also punishable. Now the question is whether Section 197 Cr.P.C is attracted. In the instant case it is admitted that the complainant was taken into custody in pursuance of Crime No.236/1996 of Mala Police Station. There is no dispute in this regard. It is his specific case that he was subjected to torture when he was in police custody and the

torture was inflicted in the attempt of the accused Police Officer to extort confession. Section 330 I.P.C itself, as pointed out by the counsel for the revision petitioner is with respect to causing hurt to extract confession or any information which may lead to the detection of an offence etc. Hence, evidently it is contended that the act of taking into custody of the complainant and keeping him in police custody and questioning him were in pursuance of the discharge of his official duties and, hence, the same is covered by Section 197(1) Cr.P.C. On the other hand, the counsel for the respondent/complainant has contended that custodial torture can never be treated as official duties. The counsel has relied on the decision in **Rakesh Kumar Mishra vs.State of Bihar and others [(2006) 1 SCC 557]** wherein there are observations that it is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. I find that the three number bench of the Supreme Court by a majority in **Sankaran Moitra vs. Sadhna Das and another [(2006) 4 SCC 584]** has considered the entire gamut and amplitude of Section 197 Cr.P.C. Their Lordships have also considered the existing case law on the point. It was observed that if Section 197 Cr.P.C is construed too narrowly it can never be applied, as it is not part of an

official's duty to commit an offence. The official duty can be performed in perfect, legal and innocent manner and also in a dishonest manner. If it was innocent, it was in an official act; if it was dishonest, it was the dishonest doing of an official act. But in either event the act was official because he could not have done that otherwise than in an official manner. If it was official in the one case it was equally official in the other, and the only difference would lie in the intention with which it was done; in the one event it would be done in the discharge of an official duty and in the other, in the purported discharge of the official duty and that in that case Section 197 Cr.P.C applied, relying on the decision in **Shreekantiah Ramayya Munipalli and another vs.State of Bombay [AIR 1955 SC 287]**. The top court in Sankaran Moitra's case (op.cit) has also relied on the decision in **Rizwan Ahmed Javed Shaikh v.Jammal Patel [(2001) 5 SCC 7]** that:-

“The real test to be applied to attract the applicability of Section 197(1) is whether the act which is done by a public officer and is alleged to constitute an offence was done by the public officer whilst acting in his official capacity though what he did was neither his duty nor his right to do as such public officer. The act complained of may be exercise of the duty or

in the absence of such duty or in dereliction of the duty, if the act complained of is done while acting as a public officer and in the course of the same transaction in which the official duty was performed or purported to be performed, the public officer would be protected."

8. This Court in **Shoukkathali vs.State of Kerala [2005 (3) KLT 634]** has also found that:-

"Protection afforded by Section 197 is illusory if the word offence alleged to have been committed by him while acting or purporting to act on the discharge of official duty is given a narrow meaning."

9. It is also to be noted that in Sankaran Moitra's case (op.cit) the Supreme Court at para 25 has even considered the question as to whether killing of a person by use of excessive force can be taken as done in performance of duty. The Court has observed but the question is whether the act was done in the performance of duty or in purported performance of duty; and held that if it was done in performance of duty or purported performance of duty, Section 197 of the Code cannot be bypassed by reasoning that killing a man could

never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted. In view of the ratio of the decision in Sankaran Moitra's case (op.cit) I find that for prosecuting the custodial torture alleged in the instant case requires previous sanction under Section 197(1) Cr.P.C. The proceedings initiated is hit by Section 197(1) Cr.P.C and hence trial and conviction of the revision petitioner is vitiated. The sentence imposed is set aside. The revision petition is allowed.

K.R.UDAYABHANU,
Judge

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K.R.UDAYABHANU, J.

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Crl.R.P.No.2786 of 2003-D
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26th September, 2007